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BEFORE THE
SURFACE TRANSPORTATION BOARD

REBUTTAL COMMENTS OF THE

OHIO RAIL DEVELOPMENT COMMISSION

IN EX PARTE 582 (Sub. No. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

Keith G. O'Brien
John D. Heffner
Rea, Cross & Auchincloss
1707 L Street, N.W.
Suite 570
Washington, DC 20036
(202) 785-3700

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ORIGINAL

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OHIO RAIL DEVELOPMENT COMMISSION
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The Ohio Rail Development Commission (ORDC) is the agency of the State of Ohio mandated to "develop, promote, and support safe, adequate, and efficient rail service throughout the state." As such, ORDC has been, and continues to be, the lead Ohio agency in developing policies and positions regarding rail mergers.

ORDC has reviewed many of the Reply Comments submitted by the railroads, other government agencies, and shipper interests in the Ex Parte 582 proceedings. ORDC's comments herein primarily register Ohio's position concerning some of the December Reply Comments. However, ORDC remains committed to the comments we have supplied to the Surface Transportation Board (STB) throughout this proceeding in full and as summarized below:

* ***Enhanced Competition:*** Future mergers must enhance competition through "Reasonable Access" along the lines of the Ex Parte 575 Railroad Industry Agreement. *ORDC, Nov. 17 Comments at 2, Dec. 18 Reply Comments at 3-4.*

* ***Non-Applicants Suggest Ways to Enhance Competition:*** The Board should not rely solely on the Applicants to suggest ways to enhance competition but should seek

suggestions from states, shippers, and small railroads. *ORDC Nov. 17 Comments at 4, 8-9. ORDC Dec. 18 Reply Comments at 4-5.*

* ***Service Failure Remunerations/Up Front Negotiated Agreements:*** Merging railroads need to pay shippers and small railroads remuneration for merger related service failures. The Board should evaluate merger proposals based on Applicants' willingness to enter into self-executing agreements with rail users and small railroads to provide such remunerations. *ORDC Nov. 17 Comments at 3, ORDC Dec. 18 Comments at 8-9.* Such remuneration is necessary because the traffic and revenue losses experienced by short line railroads after the Conrail breakup could, and in some cases did, seriously weaken some short lines financially thereby threatening the continuation of essential rail service.

* *Board Supported Mediation to Augment Negotiations:* The Board needs to offer mediation to rail users, communities, and other impacted parties because the advantage class I railroads often have in terms of monetary and human resources and bargaining power makes it difficult to effectively negotiate. *ORDC Nov. 17 Comments at 5-6 and 14-15, ORDC Dec. 18 Reply Comments at 7-8.*

* ***Need for Board Office of Public Counsel:*** The Board should expand its services to include a fully staffed "Office of Public Counsel" as called for in PL 94-210, The Railroad Revitalization Act. *ORDC Nov. 17 Comments at 15-16.* This office should have the ability to participate fully in the adjudicatory process including discovery, any evidentiary hearings, and oral argument to develop the record from a "public interest" perspective.

* ***Equitable Treatment for Rail Labor:*** The Board should treat rail labor fairly and equitably and ensure that safety for rail labor will in no way be compromised by a proposed rail merger. *ORDC Nov. 17 Comments at 4.*

* ***Better Applicant Accounting of Adverse Impacts on Rail Labor:*** The Applicants need to better account for adverse impacts on rail labor. *Nov. 17 Comments at 8.*

* ***Full Delineation of Merger Benefits:*** Applicants need to provide detailed analysis of merger benefits, including an explanation of the methodologies used, and an analyses of benefits and detriments in specific, pre-determined categories. *ORDC Nov. 17 Comments at 2 and 9-11, ORDC Dec. 18 Reply Comments at 6-7.*

* ***Need for 100 % Data Tapes:*** The Applicants should provide 100% data tapes. *ORDC Nov. 17 Comments at 7-8.*

In reaction to various Reply Comments submitted to the Board, ORDC offers Rebuttal Comments in the following areas in this testimony:

1) Enhanced Competition Must Mean Rail to Rail, Intramodal Competition

2) All Carriers Serving an Effected Gateway Should Be Included in Issues Involving Open Gateway Routings

3) The Time Frame to Assess Merger Applications Should <u>Not</u> Be Shortened

4) Alternative Dispute Resolution/Mediation Concepts Need To Be Included

5) Eventual Rail "Duopoly" Should Be Addressed in a New Proceeding

6) Board Should Consider Oversight of Certain Alliances

7) New Rules Should Fully Address Issues of National Defense

(1) Rail-to-Rail Competition

ORDC has been adamant in past Ex Parte 582 testimonies that any new merger should enhance competition. Although we have stressed Reasonable Access along the lines of the Ex Parte 575 Railroad Industry Agreement, we did not emphasize enough that by enhanced competition we were primarily addressing intramodal, rail-to-rail competition. In the United Stated Department of Transportation (USDOT) and United States Department of Agriculture (USDA) December 18 Reply Comments, the case was made that the primary focus of enhanced competition should be intramodal. *USDOT Reply Comments at 4, USDA Reply Comments at 5.*

ORDC notes with interest the comparisons numerous other parties have made to merger proceedings involving other agencies and other industries. ORDC believes the Board should view with skepticism class I railroad suggestions that a major merger in other regulated industries such as power or telecommunications would be approved by other agencies with a minimum of regulatory interference.

ORDC wholeheartedly supports the USDOT position in this regard. While ORDC appreciates the value of all intermodal, rail-truck, rail-barge competition, we have heard loudly and clearly from many Ohio rail users that in many instances there really is no substitution for rail-to-rail competition. Clearly there is such a thing as a captive shipper and a captive short line. The Board's study of rail competition in a market should focus both on rail to rail competition and, as is the case in other industries, the potential market power of the combined Applicant carriers.

ORDC notes with interest the comments of some class I carriers that the Board should not require new competition as "the rent" to be paid for consideration of a merger because the enhanced competition was not "transaction-related." There are two answers to this comment. First, in the Conrail acquisition case, the Board found it within its power to grant competitive trackage rights to CP Rail for New York City access even though competition in the market had disappeared decades before. Second, the Board's "public interest" conditioning power is by its nature both vague and expansive. The Board can grant (or require) relief that is not strictly "transaction-related" where justified by the public interest.

ORDC urges the Board to ensure that it specifies "enhanced rail to rail, intramodal competition" in its final rules rather than merely "enhanced competition". Further, we urge that the Board take one step more and require that Applicants identify the beneficiaries of any new rail-to-rail competition so that it is clear to all whether any rail user who may be considered a "captive shipper" (or a "captive short line") is positively impacted.

ORDC urges the Board to consider seriously some of the very thoughtful suggestions offered by the Kansas City Southern Railway. In particular, ORDC commends KCS for its recommendation that Applicants be required to identify any stations, facilities, or terminals served by any applicant that were open to reciprocal switching at any time during the 24-month period before filing an notice of intent to merge which are no longer open to reciprocal switching. See, proposed 49 CFR sec. 1180.6(b)(15). KCS' proposal should even be broadened to include haulage rights,

"voluntary marketing agreements", and other market access arrangements. ***Reply comments of Kansas City Southern Railway at 24-7.***

2) All Carriers Should Be Involved in Gateway Issues

The USDOT pointed out in its Reply Comments that it would be unfair to the Applicants if the Board only required them to offer continued access to certain gateways to enhance competition, but did not require railroads not directly involved in the transaction to do so also. *USDOT Reply Comments at 4.* To the extent that non-applicants would not be unduly harmed, ORDC supports the USDOT position.

3) The Time Frame to Review Mergers Should Not Be Shortened

ORDC joins USDOT *(Reply Comments at 7-8),* Union Pacific *(Union Pacific Reply Comments at 34-36),* the United State Department of Agriculture *(USDA Reply Comments at 2)* and others in urging the Board NOT to shorten the review process as Burlington Northern And Santa Fe had proposed. ORDC generally favors transcontinental mergers but has repeatedly stated that if the next round of mergers will draw the American rail map for the next century or perhaps forever, there is absolutely no reason to rush to judgement.

4) Alternative Dispute Resolution/Mediation Concepts Should Be Included

In its discussions of Service Guarantees, USDOT recognized the value of negotiated agreements between Applicants and railroad customers but also recognized that: "There is also a need for an alternative dispute resolution process" along the lines of established voluntary arbitration processes. *USDOT Reply Comments at 6-7.* ORDC supports alternative dispute resolution. As noted above in this filing, ORDC has

proposed mediation, mandatory for the railroads but optional for other parties, as one possible alternative dispute resolution tool. ORDC continues to urge the Board to become involved in mediation because in a mega-merger, many rail users, communities, and even some states, lack the resources, both monetary and human, as well as the bargaining power, to match what the merging class I railroads bring to the negotiating table. Even two class I railroad commenters - Norfolk Southern and Kansas City Southern - as much as concede there are areas where the Board should have the power to resolve a dispute where parties cannot reach an agreement through negotiation ["if a negotiated agreement cannot be reached, the Board should proceed to render an independent decision resolving the dispute and addressing the merits of the claimed environmental impact concerns. " *Initial comments of Norfolk Southern dated November 17, 2000 at 57.* "...KCS believes the Board should make clear that if an agreement cannot be reached, the Board will be available to resolve any disputes under the existing law and precedent." *Initial comments of Kansas City Southern Railway Company at 19*]. These recommendations apply to all matters in dispute, not just environmental issues.

In its Reply Comments, CSX *seemed to take* exception to ORDC's position on mediation by stating: "ORDC's comments, in contrarian fashion, expressly oppose negotiated agreements. They express concern that some impact may be left unremediated by any voluntary agreement." *CSX Reply Comments at 80.*

Contrary to CSX' claim, ORDC is not opposed to voluntary agreements. Certainly there are many governmental units such as states and cities, as well as large manufacturing concerns which can and should negotiate agreements, *privately or before*

the Board, because they have the capabilities of doing so. However, there are many more which cannot.

A quick look at the CSX Reply Comments give a reasonable indication of what it takes to go head to head in negotiations, *or at the Board*, with a class I railroad on a major merger issue. CSX's 90 pages of Reply Comments were apparently put together by 13 attorneys working for CSX and 3 different outside firms. Small entities, such as the City of Fostoria and Wyandot Dolomite, ***both of which were adversely impacted through the Conrail transaction,*** do not have such resources at their disposal. ORDC believes Board supported mediation would merely level the playing field for many communities, rail users, and small railroads.

CSX raised its issues about ORDC's supposed disbelief in negotiations in the context of continued oversight. CSX objected to the prospect of paying communities and other entities to remedy downstream environmental harms not envisioned in the original negotiations. As ORDC pointed out in its November 17 Comments, state and local public sources will be paying $180 million over the next 10 years to build grade separations which it believes are the downstream of the Conrail transaction. ORDC Nov. 17 Comments at 5-6. CSX and NS will each provide $10 million toward these new grade separations. ORDC believes that this grade separation issue could have been more readily, and perhaps more equitably resolved, if it had been subject to Board mediation. Further ORDC contends that Board mediated environmental issues would be less likely to be brought up again at a later date than issues which were addressed in negotiated agreements.

5) Eventual Rail Duopoly Should Be Addressed in New Proceeding

ORDC's past comments have agreed with the Board's proposed rules that downstream results of proposed mega-mergers need to be examined. We did, however, point out that the logistics of actually looking downstream would be difficult to include in the Ex Parte 582 rulemaking. *ORDC Nov. 17 Comments at 11-12.* USDOT proposes that the "final solution", that is the ultimate transcontinental rail duopoly, might be best addressed in a separate Board proceeding. *USDOT at 10-11.* ORDC supports this concept and urges the Board to commence a separate proceeding.

6) Board Should Consider Oversight of Certain Alliances

In our November 17 Comments, ORDC supported the concept of the Board taking "a hard look" at the alliance issue, i.e. railroads implementing voluntary agreements which do not involving the control of one railroad by the other but, none the less, have negative impacts on certain parties. ORDC pointed out that increased train traffic through a community resulting from an alliance has the same negative impacts as increased train traffic resulting from a merger. *ORDC Nov.17 Comments at 16.*

The Association of American Railroads in its Reply Comments objected to ORDC's viewpoint stating that voluntary alliances can be pro-competitive and that including alliances in the Board's merger rules raises the specter of new and unneeded regulatory scrutiny. *AAR Reply Comments at 12-13.* ORDC agrees that the Ex Parte 582 rule making may not be the best place to decide alliance issues. However, ORDC urges the Board and the Federal Railroad Administration to make provisions for addressing (if not deciding) the issues in this or other proceedings.

7) New Rules Should Fully Address Issues of National Defense

In our review of Comments and Reply Comments, ORDC has noticed that little consideration has been given to national defense issues. ORDC has reviewed the November 17 comments of the Military Traffic Management Command Transportation Engineering Agency (MTMCTEA) of the Department of Defense (DOD). ORDC urges the Board to include these MTMCTEA comments in its final rulemaking. ORDC strongly believes that transportation is a critical element of national defense. The merger reporting requirements which MTMCTEA seeks should not be an undue burden upon Applicants because of the end to end nature which the next round of transcontinental mergers will take.

ORDC appreciates the Boards continuing diligence in establishing new merger rules. We thank you for considering our comments.

Respectfully Submitted,

Keith G. O'Brien
John D. Heffner
Rea, Cross & Auchincloss
1707 L Street, N.W.
Suite 570
Washington, DC 20036
(202) 785-3700

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CERTIFICATE OF SERVICE

I hereby certify that I have served the forgoing on behalf of the Ohio Rail Development Commission, on all known parties of record on the service list on this the 11th day of January, 2001 by U.S. Mail postage prepaid.

Keith G. O'Brien
John D. Heffner